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Whirlpool Corporation and United Steelworkers of America AFL-CIO, CLC. Case 8-CA-28612

July 5, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND BARTLETT

On August 9, 2000, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order² as modified.

1. We adopt the judge's finding that Shift Supervisor Dick Kretz violated Section 8(a)(1) by informing employees that they were not allowed to distribute union literature on company property. Accordingly, we have entered a remedial order for that unlawful conduct.

Our colleague assumes that the Respondent's conduct was unlawful, but finds, pursuant to the Board's holding in *American Federation of Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973), that a remedial order is not warranted. Contrary to our colleague's contention, *Jimmy Wakely* is not applicable here. In that case, the unfair labor practice complaint alleged only one violation, i.e., a threat to bring charges against a union member in violation of Section 8(b)(1)(B) of the Act. Further, the threat had been effectively rescinded before the complaint issued. In these circumstances, the Board found that the case involved "one of those 'infinitesimally small abstract grievances [that] must give way to actual and existing legal problems if courts [and the NLRB] are to dispose of their heavy calendars.'" 202 NLRB at 621 (footnote citations omitted). Accordingly, although the alleged conduct may have been in "technical contravention of the statute," the Board concluded that it "ought not to expend the Board's limited resources

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001). Further, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 20 (2001).

on matters which have little or no meaning in effectuating the policies of the Act," and declined either to find a violation or issue a remedial order. 202 NLRB at 622.

Here, by contrast, several unfair labor practices were alleged and found, including other violations of Section 8(a)(1), and the violations of Section 8(a)(3) that are discussed below. Indeed, as shown below, the 8(a)(1) violation at issue here is part of the evidence demonstrating that the Respondent harbored antiunion animus, an essential element in finding that the alleged 8(a)(3) conduct was unlawfully motivated. Accordingly, the conduct here of Shift Supervisor Kretz cannot reasonably be considered as one of "infinitesimally small abstract grievances" that the Board was concerned with in *Jimmy Wakely*. Rather, it is part of a pattern of unlawful conduct that was litigated and adjudicated in order to fully resolve all of the allegations of the complaint.

For these reasons, we need not reach the issue, raised by our colleague, of whether the holding of *Jimmy Wakely* should be applied in cases involving findings of multiple unfair labor practices, one of which is a relatively minor violation of the Act having no connection to the other violations found. On its facts, this is not such a case.

2. We also adopt the judge's finding that the Respondent violated Section 8(a)(3) of the Act by disciplining employees David Hamilton and Jerry Pore. The evidence establishes that both Hamilton and Pore were early and open union activists, a fact known to the Respondent. The Respondent harbored antiunion animus, as shown by its unlawful attempt to prevent employees from distributing union literature, disciplining Hamilton for "harassment" solely on account of his union discussions with employees, and disciplining Pore for distributing union literature on company property. Thus, as the judge found, the General Counsel carried his initial burden of showing, pursuant to *Wright Line*,³ that Hamilton's and Pore's protected activities were a motivating factor in the Respondent's decision to discipline them.

³ 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

No party contends that *Wright Line* is not the appropriate analysis here. Thus we do not pass on our colleague's contention that the discipline of Hamilton and Pore should be analyzed pursuant to the standard set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). However, assuming arguendo that *Burnup & Sims* is applicable here, we agree with our colleague that a violation would be established under that standard as well.

Member Liebman observes that the Board is rejecting the Respondent's defense that it held a "reasonable, genuine belief" that either Hamilton or Pore engaged in misconduct in the course of soliciting fellow employees about union matters. Accordingly, it need not decide the issue whether their union activities lost the Act's protection or "crossed over the line separating protected and unprotected activity." *Phoenix Transit System*, 337 NLRB No. 78, slip op. at 1 (2002). See also *Neff-Perkins Co.*, 315 NLRB 1229 (1994); and *Felix Industries*, 331 NLRB No. 12 (2002), remanded 251 F.3d 1051 (D.C. Cir. 2001).

Accordingly, the burden shifted to the Respondent to show that the discipline of Hamilton and Pore would have occurred even in the absence of their union activity. We agree with the judge that the Respondent did not satisfy its burden.

The Respondent submitted that it acted pursuant to an honest belief that these two employees had engaged in improper conduct. Regarding Hamilton, the Respondent contended that it disciplined him solely because of employee complaints about his conduct, and not because of his support for the Union. However, in the disciplinary discussion with Hamilton regarding the employee complaints, Supervisor Beck linked the complaints to Hamilton's union activities. Beck admonished Hamilton that he "should not be harassing the ladies and talking about the Union during work time." The judge found that the Respondent did not present sufficient evidence from the purported complaining coworkers (who did not testify at the hearing) regarding: the precise nature of Hamilton's alleged conduct; what in his behavior was offensive, threatening, or intimidating; how or whether his conduct interfered with their work or job performance; and, whether his conduct was, in fact, prohibited by Respondent's policies and rules.

Similarly, the Respondent disciplined Pore for "inappropriate activity . . . handing out [union] literature on company time," in violation of a company rule, based on complaints allegedly lodged by Pore's coworkers. The coworkers were not called to testify. However, Pore credibly testified that he had discussed the Union with employees during worktime, but had not generally handed out literature except for instances when employees specifically requested it. The Respondent conceded that it had routinely allowed Pore and other employees to engage in nonbusiness discussions and solicitation on the work floor during work hours. The judge found insufficient evidence to support a finding that Respondent reasonably and genuinely believed that Pore had engaged in misconduct, i.e., violation of its solicitation rule.

The discipline of Hamilton and Pore is in stark contrast to the Respondent's usual practice of permitting a wide range of nonbusiness activities on the work floor during work hours. The record contains no evidence that any employee was disciplined for such nonunion, non-business activities. Having found that the Respondent did not hold a "reasonable, genuine belief" that either Hamilton or Pore engaged in misconduct when it disciplined them, the judge declined to rely on their alleged acts of misconduct and concluded they were "mere shibboleths to justify interference with rights guaranteed employees under the Act." We agree.

In its exceptions, the Respondent contends that the judge violated its due process rights by not putting the Respondent on notice that its "honest belief" concerning

the reason for disciplining Hamilton and Pore would be in issue.⁴ We find no merit in this contention.

The fundamental elements of procedural due process are notice of the matters of fact and law asserted and an opportunity to be heard.⁵ We find that the notice given to the Respondent met these due process requirements.

The complaint broadly alleged that the Respondent violated Section 8(a)(3) of the Act by discriminatorily disciplining Hamilton and Pore.⁶ It was not limited to a theory of disparate treatment. Thus, the complaint placed in issue *any* matter pertaining to the Respondent's decision to discipline, including: the Respondent's motive and basis for reaching the decision; the events that transpired to cause the Respondent's belief that Hamilton and Pore had violated its rules; and the reasonableness of that belief, based on the available evidence. Thus, once the General Counsel met his initial burden of showing that the Respondent acted for discriminatory reasons, the burden shifted to the Respondent to establish its defense—be it that it acted pursuant to an "honest belief" or otherwise acted for lawful reasons. Accordingly, the reasonableness and genuineness of the Respondent's belief that discipline was warranted was essential to the Respondent's defense against the allegations of the complaint. Again, for reasons set forth by the judge and set forth above, we conclude that the Respondent failed to establish its defense.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Whirlpool Corp., Findlay, Ohio, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place desig-

⁴ In this regard, the Respondent relies on *Stanton Industries*, 313 NLRB 838, 852–854 (1993). There, the Board adopted, in the absence of exceptions, an administrative law judge's finding that one of the General Counsel's theories of an 8(a)(1) violation should be rejected because it was not fairly encompassed within the allegations of the complaint. Essentially, the *Stanton* judge ruled that the General Counsel had limited his theory of a violation to one of disparate treatment. It is well settled that the Board's adoption of a portion of a judge's decision to which no exceptions are filed does not serve as precedent for any other case. *ESI, Inc.*, 296 NLRB 1319 fn. 3 (1989); *Amniston Yam Mills*, 103 NLRB 1495 (1953). In any event, we find *Stanton Industries* distinguishable from this case. Here, as we find below, the complaint allegations were not limited, but rather placed squarely in issue the Respondent's asserted "honest belief" in the validity of its basis for disciplining Hamilton and Pore.

⁵ See, e.g., *Henry Bierce Co. v. NLRB*, 23 F.3d 1110 (6th Cir. 1994), and cases cited there.

⁶ The complaint also alleged that this conduct constituted an independent violation of Sec. 8(a)(1). The judge did not address this allegation. The General Counsel did not except to the omission.

nated the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., July 5, 2002

Wilma B. Liebman,	Member
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Michael J. Bartlett,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring in part and dissenting in part.

1. My colleagues find a violation and enter a remedial order with respect to supervisor Kretz’ telling off-duty employees that they were not allowed to distribute union literature on company property.

Contrary to my colleagues, I do not believe that Respondent’s conduct warrants a remedial order in this respect. Accordingly, I would dismiss the allegation.

The evidence establishes that on November 13, 1996, about 80 minutes before the scheduled start of their shift, employee John Trice and a group of 6 to 8 other employees assembled on the Respondent’s property near the northeast door to the plant and began distributing Union literature. Almost immediately, a security guard approached the employees and asked them what time their shift began. Trice answered the question. The guard told Trice and the other employees that they were not allowed on company property until 15 minutes prior to their shift. Trice responded that such a rule had never been enforced. Without further comment, the guard returned to the plant to check on what, if anything, should be done. The employees remained and continued to distribute literature.

About 10 minutes later, Shift Supervisor Dick Kretz approached the employees and told them that employees were not permitted to hand out literature on company property. Trice responded that the employees’ distribution of literature was “legal” and suggested that Kretz “should study the law [on the subject].” Kretz said he would do so and returned to the plant. He immediately consulted Sandy Franks, the director of the Respondent’s human resources department. Franks told Kretz that employees had “every right to stand there,” and that employees were entitled to distribute union literature on nonwork time in nonwork areas. Accordingly, Kretz permitted the activity to continue. The employees continued to distribute union literature without further interference. There is no evidence that any employee was

disciplined or otherwise adversely affected as a result of these events.

There is no evidence that either the security guard or Kretz was confrontational or threatening. To the contrary, when the employees protested, the guard went to check as to what, if anything, should be done. The same scenario was repeated by Supervisor Kretz. The entire process of checking (by the security guard and Kretz) took only a few minutes. During this period, the Section 7 activity continued unabated. In these circumstances, I see no need for the Federal Government to step in, proclaim a Federal law violation, and issue a remedial order. The Respondent’s agents acted responsibly—they checked on the issue and promptly came up with the correct answer. The employees continued their Section 7 activities without interruption. I would leave matters at that.

My position is supported by Board precedent. In *American Federation of Musicians Local 176 (Jimmy Wakely)*, 202 NLRB 620 (1973), the Board said:

We believe the courts are coming to the view that violations having little or no impact upon employee exercise of statutory rights should not form the basis of either a proceeding or a remedy under our Act.

The Board concluded:

In sum, in view of the increasing need for expedition in the processing of cases, we have concluded that we ought not expend the Board’s limited resources on matters which have little or no meaning in effectuating the policies of this Act. Thus, in this insubstantial case, we would find that the conduct involved, although it may have been in technical contravention of the statute as interpreted by this Board, was nevertheless so insignificant and so largely rendered meaningless by Respondent’s subsequent conduct that we will not utilize it as a basis for either a finding of violation or a remedial order. The complaint herein should be, and it hereby is, dismissed.

For similar reasons, I would dismiss the allegation herein.¹

My colleagues argue that *Jimmy Wakely* is distinguishable. They say that the allegation at issue there was the sole allegation in the complaint, in contrast to the instant case where the allegation at issue is one of several allegations of the complaint. The argument has no merit. As noted and quoted above, the rationale of *Jimmy Wakely* rests on broad policy grounds, and is not subject to the narrow limitation imposed by my colleagues. Further, based on those enunciated policy grounds, there is no rational distinction between a case where a de minimus

¹ See also my concurring opinion in *Teamsters Local 85, 328 NLRB 72* (1999).

allegation stands by itself and a case where the de minimus allegation is accompanied by other allegations. In the former situation, there is needless litigation of an entire case; in the latter situation, there is needlessly prolonged litigation. In both instances, it would save time and money to refrain from litigating these matters.

I also recognize that, in the instant case, there are other violations of the Act. However, I do not view that asserted distinction as dispositive. The other violations are being remedied, as they should be. However, there is no need to clutter up this case with a piece of conduct that was effectively rescinded before it caused any harm.

My colleagues also say that the conduct at issue shows animus to support an 8(a)(3) violation. I do not agree that animus is shown by an employer's conduct that is promptly rescinded because the employer recognizes that the employee activity is protected.

My colleagues also note that the rescission of the unlawful conduct in *Jimmy Wakely* occurred before the issuance of the General Counsel's complaint. In response, I note initially that the conduct here was also rescinded before the issuance of the complaint. In any event, these factors are not determinative. If unlawful action is rescinded, for whatever reason, before there is any harm done to protected persons, it should not make any difference whether the rescission was because of a pending complaint or otherwise. The important point is that a rescission occurred before any harm was done. As in *Jimmy Wakely*, there was "little or no impact upon employee exercise of statutory rights."

2. I agree with my colleagues that Respondent unlawfully disciplined employees Hamilton and Pore. However, my basis for doing so is somewhat different.

I do not agree that this case presents a *Wright Line* situation. In a *Wright Line* situation, there is an issue as to the employer's motive, i.e., was the employer's disciplinary action motivated by protected activity or by some unprotected conduct. In the instant case, the motive is clear. It is clear and uncontested that Respondent disciplined Hamilton and Pore because of the manner in which they solicited fellow employees concerning union matters. The issue is whether their manner of solicitation crossed the line into unprotected harassment. I agree with the judge that Respondent has not shown a good-faith belief that Hamilton and Pore crossed that line. And, even if Respondent has shown this, the evidence indicates that they did not in fact cross that line. Thus, the discipline was unlawful. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

Dated, Washington, D.C., July 5, 2002

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discipline employees engaged in lawful protected activity.

WE WILL NOT discipline (counsel) or otherwise discriminate against employees because of their known or suspected membership in and/or support for United Steelworkers of America, AFL-CIO, or any other labor organization.

WE WILL NOT tell employees that they are not allowed to distribute union literature on company property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL make David Hamilton and Jerry Pore whole for any loss of earnings and other benefits resulting from their disciplines because of known or suspected membership in and/or support for United Steelworkers of America, AFL-CIO, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files, including so-called yellow cards, any reference to David Hamilton and Jerry Pore's unlawful disciplines (counseling), and within 3 days thereafter, notify them in writing that this has been done and that the disciplines will not be used against them in any way.

WHIRLPOOL CORPORATION

Nancy Recko, Esq., for the General Counsel.
Frederick L. Schwartz, Esq. (Adam, Witen, Litler, Mendelson), of Chicago, Illinois, for the Respondent.
Patrick Gallagher, of Warrensville Heights, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This matter was heard by me in Findlay,¹ Ohio, on February 15, 2000, upon a complaint dated August 31, 1999, charging Whirlpool Corporation (the Respondent) with violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). This complaint was based on charges filed by the United Steelworkers of America AFL-CIO, CLC (the Union) on October 21, 1966, and as amended on June 25, 1997, with the National Labor Relations Board (the Board) in Region 8. The complaint² charges that the Respondent violated Section 8(a)(1) of the Act by removing pronoun literature and notices from employee bulletin boards; informing an employee that it would close the facility if the Union were selected as the employees' collective-bargaining representative; informing employees that selection of the Union as their collective-bargaining representative would be futile as it would not bargain in good faith with a union; and informing employees that they were not allowed to distribute union literature on company property. The Respondent is also charged with violating Section 8(a)(3) of the Act by discriminatorily disciplining two employees, David Hamilton and Jerry Pore, because of their union activities.³

On September 9, 1999, the Respondent timely filed its answer admitting, among other things, the jurisdictional allegations, the labor organization status of the Union, the agent, or supervisory status of Mark Beuhrer, manufacturing manager; Lee Beck, Steve Dearth, Dick Krenz, Ron Linke, Steve Oren, and Monte Sampson, manufacturing supervisors; Michelle Obenour, assistant warehouse supervisor;⁴ and Donald Holtgreven, administrative supervisor. The Respondent generally denied committing any unfair labor practices and asserted certain defenses.⁵

Based on my review and consideration of the entire record in this case and my observation of the witnesses and their demeanor, as well as the arguments and briefs of the General Counsel and the Respondent,⁶ I make the following

¹ The transcript often refers to "Finley"; however, this is a misspelling of the town's name (properly spelled as Findlay) as noted by the General Counsel in her brief wherein she moves to amend and correct the transcript to reflect the proper spelling of the town. I have granted this motion.

² Paragraph 8 of the complaint was withdrawn by the General Counsel at the hearing, with prior notice to the Respondent's counsel who did not object at the hearing.

³ Without objection from the Respondent, the General Counsel moved to amend the complaint with regard to the date of alleged discriminatee Pore's discipline, from October 6 to October 10, 1996. The Respondent did not object, and I granted the amendment.

⁴ The Respondent originally denied that Obenour held the position alleged in the complaint. At the hearing, however, the Respondent stipulated that irrespective of her title, she was a supervisor as defined by the Act during the relevant period. (Tr. 11.)

⁵ The Respondent did not pursue or argue certain defenses stated in its answer at trial or in its brief. However, I have considered these defenses in light of the entire record herein and would conclude these purported defenses to be without merit.

⁶ The Charging Party did not submit a separate brief.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the manufacture of household appliances at its offices and facility in Findlay, Ohio. During the last 12 months, and annually, the Respondent, in conducting its business operations sold and shipped from its Findlay, Ohio facility, goods valued in excess of \$50,000 directly to points outside the State of Ohio. The Respondent admits, and I find and conclude, that at all times material, it is, and has been, an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Charging Party, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND⁷

The Respondent manufactures household appliances such as refrigerators and dishwashers at its Findlay plant. The Respondent's employees have not been represented by a union for over 20 years. Around June 1996, the Union and various employees of the Respondent undertook a campaign to organize the Company's employees and encourage them to select the Union as their exclusive collective-bargaining representative. On or about October 28, 1996, the Union filed with the National Labor Relations Board (the Board) a petition seeking to represent the Respondent's Findlay employees; an election was held on December 13, 1996, and the results—the Union lost—were certified by the Board's Regional Director for Region 8 on December 30, 1996.

III. THE UNFAIR LABOR PRACTICES ALLEGATIONS

A. *A Preliminary Discussion of the Legal Principles Applicable to the 8(a)(1) Allegations*

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act. The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. *Williamhouse of California*, 319 NLRB 699 (1995). The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995).

⁷ In this section, I have outlined certain matters that factually are not in dispute and/or represent findings on my part based on factual stipulations of the parties and the credible evidence (including the reasonable inferences therefrom) of record. To the extent that these findings are contrary to or inconsistent with other evidence of record, I have specifically credited the findings in this section over any other arguably contrary or inconsistent evidence.

The Board has consistently held that employers who convey a sense of the futility of selecting a bargaining agent may violate Section 8(a)(1). *Trane Co.*, 137 NLRB 1506 (1962); *American Telecommunication Corp.*, 249 NLRB 1135 (1980). Also, the Board draws a distinction between what may be termed permissible predictions and prohibited threats for purposes of Section 8(a)(1); that is, an employer generally must provide an objective factual basis outside the employer's control for predictions of adverse consequence of unionization.⁸ An employer who makes statements regarding plant closure if the employees select the union may violate the Act. *Atlas Microfilming*, 267 NLRB 682 (1983), enf'd. 753 F.2d 313 (3d Cir. 1985); and *Baby Watson Cheesecake, Inc.*, 320 NLRB 779 (1996). Additionally, employers who tell employees that the company will not bargain in good faith if the union is elected may violate Section 8(a)(1). *Fieldcrest Cannon*, 318 NLRB 470 (1995).

Employees who maintain and enforce a policy prohibiting off-duty employees from distributing union literature in non-working areas of an employer's property without legitimate business justification violates Section 8(a)(1). *St. Luke's Hospital*, 300 NLRB 836, 837 (1990); and *Orange Memorial Hospital Corp.*, 285 NLRB 1099 (1987).

The Board has held that while employees do not have a statutory right to use an employer's bulletin board, such use receives the protection of the Act when the employer permits them to use bulletin boards for the posting of personal notices. In these circumstances, an employer may not remove union notices. *Container Corp. of America*, 244 NLRB 318 fn. 2 (1979). *Doctors Hospital of Staten Island, Inc.*, 325 NLRB 730, 735 (1998). However, when the employer maintains a rule regarding permissible posting on company bulletin boards and enforces it strictly and not discriminatorily, the rule may stand and no violation occurs.

In *Honeywell, Inc.*, 262 NLRB 1402 (1982), enf'd. 722 F.2d (8th Cir. 1983), the Board summarized the prevailing legal principles applicable to bulletin board postings, as follows:

The legal principles applicable to cases involving access to company-maintained bulletin boards are simply stated and well established. In general, "there is no statutory right of employees or a union to use an employer's bulletin board." However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any nonwork related matters, it may not "validly discriminate against notices of union meetings which employees also posted." Moreover, in cases such as these, an employer's motivation, no matter how well meant, is irrelevant. [Footnotes omitted.]

Thus, if an employer allows employees space to post items of interest, it may not impose content based restrictions that discriminate between postings of Section 7 matters and other postings. *Vons Grocery Co.*, 320 NLRB 53, 55 (1995). Furthermore, the employer may not remove union literature from gen-

eral purpose bulletin boards, while leaving other items of a personal and/or nonbusiness nature. *Kroger Co.*, 311 NLRB 1187 (1993).

With the foregoing serving as a legal framework, we turn to the specific 8(a)(1) charges.

IV. THE 8(a)(1) CHARGES

A. *The September 1996 Removal of Union Literature Charge*

John Trice has been employed by the Respondent for the past 16 years and is currently employed by the Respondent at Findlay working the day shift (6:30 a.m. to 2:30 p.m.) for the past 9 years. Trice was the sole witness called by the General Counsel to testify about the September 1996 literature removal allegations.

According to Trice, he became very involved early on in the union organizing campaign (in late July or early August 1996). He handed out union notices, wore union buttons, attended meetings, and made telephone calls on behalf of the Union. He also posted union literature around his department and in other areas of the plant on eight to ten cork bulletin boards—so called public boards—which he said the employees were allowed to use. Trice described himself as a union supporter who would like to see the Union prevail in the instant litigation.

According to Trice, while working the Sears dishwasher line, he saw management personnel remove prounion literature he had posted on one of the public corkboards on two occasions. The first time occurred towards the end of August when Trice observed admitted supervisor Stan Oren approaching the Sears product area and stopping to remove union literature and then leaving the area. According to Trice, Oren did not remove other miscellaneous nonbusiness notices, including one item Trice described as a calendar. On another occasion around the end of September, Trice said he saw admitted supervisor Ron Linke walking over to the same board and also remove union literature and leave the area; he saw no other items being removed by Linke. According to Trice, these were the only occasions he observed anyone from management removing union literature or notices;⁹ and while he complained to the Union, he never brought the matter to management's attention.¹⁰

The Respondent called Ronald (Ron) Linke and Stanley (Stan) Oren to rebut these charges.

Linke¹¹ testified that on two to four occasions during the union campaign, he removed prounion literature from the public bulletin boards, but only to copy the materials and then return them to the board; that the material copied in this fashion was removed for only around 3 minutes. According to Linke, Oren accompanied him on occasion and they both simply removed the material, walked 20 paces or so down the hall to a copy machine, copied the material, and replaced it; he and Oren also copied procompany literature after this fashion. Linke stated that his (and Oren's) sole purpose in copying the material was

⁹ Trice provided a sworn affidavit to the Board investigator and on cross-examination acknowledged that he averred in the affidavit that he posted union literature on 15 occasions; and that the postings would be removed within 5 minutes to 1 week. He provided no further explanation for these incidents.

¹⁰ Trice said that he did not confront or ask Linke or Oren to stop removing or why they were removing the literature on these two occasions.

¹¹ Linke had worked for the Respondent 28 years, and in the fall of 1996 was the first shift supervisor in the dish rack department. Linke was Trice's supervisor.

⁸ See, for example, *Jefferson Smurfit Corp.*, 325 NLRB 280, 285 (1998), where a plant manager's statement concerning loss of benefits—that the employees could gain money or lose money through collective bargaining with the union should it be selected—was not considered a threat of loss of benefits.

to keep his boss, Mark Buehrer, informed and the copies were given to Buehrer for his information. According to Linke, he and Oren were not instructed to copy these materials by anyone in management; they took it upon themselves to copy the material merely to keep their bosses informed. However, Linke acknowledged that any unauthorized materials placed on so-called nonpublic boards were routinely taken down. Linke cited the nonpublic board near the Sears line as an example, which he said was clearly marked “for business use only” and was intended by management to be used only for notices about which parts were scheduled for the Sears product line. Linke noted, however, that the board was often used improperly by the employees for nonbusiness notices. According to Linke, any notices not related to the business were removed from the board and he, in fact, removed during the union campaign company literature as well as other types of notices that were placed on this restricted board.

Oren¹² also admitted that he, and on occasion accompanied by Linke, removed union literature from the employee (public) boards, but only to copy it and within a couple of minutes return the material to the board. Oren acknowledged that on one occasion when he was removing union literature, an unidentified employee commented to him and he told the employee that he was merely making a copy and would and did return it.¹³ Oren also said he was not instructed by management to do this but took it upon himself to keep Buehrer informed during the campaign. According to Oren, he personally removed and copied union material and procompany material¹⁴ only one time. Oren denied removing union literature (not particularly described) posted throughout the facility on public boards. Oren described an occasion when he and Linke happened by a bulletin board and saw some interesting union information and decided on the spot to make a copy for their boss on the nearby copy machine. Oren could not remember the date of this incident but thought it might have occurred around 10 a.m. on a workday during the campaign.

The General Counsel contends, in essence, that by removing the Union’s literature on several occasions during the organizational campaign, Oren and Linke, and therefore the Respondent, violated the Act. She further argues that their stated reasons for removing the union material—either to copy it and immediately return it to the bulletin board or because the material was posted on a restricted board—should not be credited. The Respondent counters, arguing that the General Counsel did not establish the charge that the company supervisors discriminated in removing only union literature from restricted boards and where admittedly union materials were removed, there was no evidence that the removal was permanent. Rather, the materials were taken down for a few minutes and then returned to the board, which in its view poses no violation of the Act.

First, it is undisputed that Oren and Linke, by their own admission, removed union literature from the unrestricted or pub-

lic company bulletin boards on several occasions and, in the case of Oren, he also admitted that an employee (other than Trice, evidently) saw him removing the union materials; moreover, both men admitted by implication that they did not remove other nonbusiness items from the employee bulletin boards. As such, these admissions make out a technical violation of the Act, and I would be prepared to so find. However, I believe that both Oren and Linke demonstrated remarkable candor in testifying about their part in this matter. Surely, they both could simply have denied removing the union materials, leaving Trice in a sense “outnumbered” for credibility purposes, in spite of the enhanced credibility accorded current employees by the Board. However, they chose to be honest and forthright about their activities. Therefore, I would credit their testimony that the two indeed removed the union materials (and the one pro-company item) but solely to copy the materials and then to return them to the public boards; and, further, that the materials were only removed for a few (2 to 3) minutes. I further credit Linke’s testimony that he advised the unidentified employee observing him remove the union literature of his purpose and therefore in a sense “cured” the taint of ostensibly illegal conduct.

I note in passing that the linchpin of the Board’s test for 8(a)(1) violations is reasonableness. Here, given the totality of the circumstances, I would conclude that while the Respondent may have technically violated the Act in removing the union materials from the public boards, it was de minimis in nature and not warranting a cease-and-desist order or other remedial action by the Board. I would recommend that this charge be dismissed.¹⁵

B. The November 11, 1996 “Futility” Speech

Trice also testified about an incident that occurred in a meeting conducted by the aforementioned Mark Buehrer, an admitted supervisor, during the union campaign. According to Trice, Buehrer convened a meeting in his office on about November 11 with five other hourly employees.¹⁶ According to Trice, in an hour-long presentation that included slides of closed unionized plans and comparisons of wages and benefits of the Respondent’s employees at unionized plants, Buehrer tried to convince the employees that unions were not good for Whirlpool. In response to Buehrer’s comments, Trice said that he asked Buehrer how the Company would bargain with a union. According to Trice, Buehrer said that if the employees were going to get a union at the Findlay division, Whirlpool would sit down with its company lawyer; the company would draw up a contract; they would throw it on the table and say, there it is. “Take it or walk.” (Tr. 153.) Trice said his response was that

¹² Oren has worked for the Respondent for around 22 years, and he was a supervisor in the dish rack department in the fall of 1996. During this time, Oren was only working weekends and during the week on an as-needed basis.

¹³ Oren said that Linke was present on this occasion. The public board in question was close to the employee restrooms and coffee machines.

¹⁴ Both Linke and Oren testified that one pro-company letter from an employer (Myrna Lydick) was considered to be very well written and they took it down, copied it, and provided this to Buehrer.

¹⁵ I would note that the actions of the Respondent here, temporarily removing union materials for a few minutes, stands in stark comparison to the facts of *Kroger Co.*, cited herein. In *Kroger*, a supervisor was observed taking down literature from general purpose bulletin boards which were customarily used throughout the employer’s facilities to post a variety of nonbusiness and personal items. The supervisor admitted that he permanently removed the union items because they were controversial in his mind, and outdated; he also admitted, however, allowing other nonbusiness items to remain on the boards for up to 4 to 6 months, thus discrediting his motives in removing the union materials. The 8(a)(1) violation found in *Kroger* clearly warranted a standard Board remedial action.

¹⁶ Trice was able to recall the names of two of the five hourly employees at this meeting—Phil Bowling and Cindy Wolky—neither of whom testified at the hearing.

that would not be bargaining in good faith. According to Trice, Buehrer then said that was the way Whirlpool bargained with all unions.¹⁷

Buehrer testified at the hearing.¹⁸

Buehrer stated that during the union campaign, the Respondent conducted two rounds of small group meetings with its employees regarding the Union and its organizing efforts at the Findlay plant. According to Buehrer, he personally conducted the first round with all the workers and then held 37 small group meetings over a week's time, Buehrer said he did not have anyone assist him in the presentation although another management person was always present taking notes of employee concerns and questions.¹⁹ According to Buehrer, all managers participated in company-sponsored seminars regarding union organizing campaigns and elections. Buehrer was taught in these courses not to promise anything or threaten or intimidate the employees. And, in fact, he operated from a "script" that did not include discussion of collective bargaining as such, only that he answered any questions relating to collective bargaining almost by rote with the statement, "Whirlpool has always negotiated in good faith." Buehrer admitted that during the meetings with employees, including one with Trice, he compared the Respondent's nonunion wage and benefits with those of its unionized facilities. However, Buehrer emphatically denied having made the statements attributed to him by Trice.

The General Counsel argues that Trice, as a current employee, should be believed and is otherwise credible or more so than Buehrer. She contends that if Trice is credited, Buehrer's statements to the group of employees were unlawfully coercive. The Respondent contends that Buehrer testified truthfully and honestly and that his denial of making the offending statements should be credited. The Respondent suggests that Trice, the General Counsel's sole witness, was more motivated by his zeal for and support of the Union and not for the truth. Furthermore, the Respondent notes that Trice named several other employees who supposedly attended the small group gathering; yet, these persons did not testify, suggesting that they would not corroborate Trice. The Respondent argues that Trice's testimony, therefore, is simply not corroborated and should not be given more weight than Buehrer.²⁰ Moreover, the Respondent submits that Buehrer's overall testimony, particularly his emphatic denial and his reasons supporting his denial, make him the more credible witness.

It is clear from the authorities cited herein that if it were determined that Buehrer indeed made the statements attributed to him in the small group meeting with the gathered employees, a violation would be made out. The question remains as to whether the General Counsel has met her burden of proof re-

garding the utterance of the statement by the Respondent. On this count, I am not persuaded. I recognize that by Board precedent, the testimony of current employees, like Trice, enjoys a presumptive credibility, and that Trice seemed to be a credible witness.²¹ However, by my lights, the presumption favoring current employees does not automatically convert an employer witness otherwise unimpeached into someone not to be believed. Thus, while Trice certainly testified credibly in my mind about his observations regarding the removal of union literature, his testimony about Buehrer's purported remarks is not entitled by accretion to redoubtable belief. I note also that Trice, by his own admission, was an active and staunch supporter of the Union, and in that sense cannot be considered a disinterested or neutral witness.

Here, to me, Buehrer in his own right testified forthrightly about his role in the small group meetings, and he denied making the statements. In fact, in an on-the-record exchange between Buehrer and me, he explained his position regarding how he was instructed to deal with and how he dealt with bargaining questions from employees.

By Judge Shamwell:

Q. You said you were taught what to say and not to say, did you have seminars or something that the company sponsored or what?

A. Yes.

Q. Then what was—what was basically the content of these, I guess, courses?

A. Well, during the Union campaign, you're never allowed to promise anything. You're never allowed to threaten, you've [sic] never allowed to intimidate. And—uh, we're just taught the things that you are allowed to say legally and things that you can't.

Q. So your stock reply to collective bargaining questions was that the company always would bargain in good faith?

A. Yes.

Q. That was what you were kind of taught to say?

A. Yes.

Q. And that's how you did it almost by rote?

A. Yes. [Tr. 172-173.]

On balance, in my view, Buehrer's denial was the equal of Trice's accusation and, as such, presents the typical one-on-one confrontation between equally credible witnesses. Thus, I would conclude that the evidence regarding the futility allegation is in equipoise; and that the General Counsel, thus, has failed to meet her burden of preponderance on this issue. Accordingly, I would recommend dismissal of this charge because I am not persuaded that Buehrer made the remarks attributed to him.

C. The November 13, 1996 Literature Distribution Incident

Trice testified that around 5:10 a.m. on November 13, 1996, he and six to eight other Whirlpool employees were passing out union literature on company property, but outside the plant around 15 feet from the pressroom door. On that occasion, after 10 to 15 minutes, the group was approached by a company

¹⁷ According to Trice, Buehrer's statements were accompanied by his throwing down a handful of papers by way of demonstration of his point regarding the Respondent's hard-line stance on bargaining.

¹⁸ In November 1996, Buehrer was the manager of the Respondent's dish rack operation.

¹⁹ According to Buehrer, the notes were turned in by the note taker to management but he could not recall by whom. The purpose of the note taking, according to Buehrer, was to enable the Company to deal with employee questions but were not in any way minutes of the small group meetings. Also, he, himself, took no notes during these meetings. (Tr. 171.)

²⁰ The Respondent argues that because it was not aware of the context of the statement in question, as well as any witness to the matter, it did not call any witnesses other than Buehrer himself.

²¹ The General Counsel correctly cites ample Board authority for this proposition of presumptive credibility of current employees in unfair labor practice hearings. (See GC Br., p. 4.)

security guard who asked when the group's shift started. Trice said he told the guard that his shift (as well as the others) started at 6:30 a.m. The guard advised the group that employees were not allowed on company property until 15 minutes prior to the commencement of their shift. According to Trice, he told the guard that that rule had never been enforced and advised him he and the others would not leave the area. The guard left the area. Then, around 10 minutes later, Dick Kretz, a third shift supervisor, came to the site and, according to Trice, told the group that they were not allowed to hand out literature on company property. Trice said he then told Kretz that they could legally distribute materials on company property and that Kretz should study the law (on the subject). Kretz responded that he would and left without further comment and incident. According to Trice, Kretz did not interfere with the group's continued distribution of literature; and, moreover, he was not disciplined by the Company for this incident.

The Respondent called Sandy Franks to rebut these charges.²² According to Franks, Kretz approached her on an occasion (she provided no date) and raised his concerns about the employees reporting for work early and their distributing literature while standing outside the entrance doors of the facility. Kretz sought her guidance and she told him that the employees had "every right to stand there," that the employees were entitled to distribute union literature on nonwork time in nonwork areas. According to Franks, she believed Kretz did nothing to keep any employee from soliciting or distributing materials in nonworking areas on their own time; in any event, she received no complaints about the matter.

In my view, it is uncontroverted on this record that Kretz, an admitted supervisor, told Trice and other participating employees that they could not distribute union literature on company property. And it is equally clear that Trice told Kretz he was wrong in his (Kretz's) interpretation of the law, and that Trice, and presumably the other employees, continued to hand out materials with no interference by company officials or security personnel.

The General Counsel contends that irrespective of Kretz's mistaken understanding of the law, and the failure of his comments actually to intimidate or coerce the employees, the Respondent, nonetheless, violated Section 8(a)(1). She essentially argues that less informed and less courageous employees might have bowed to Kretz's demand to stop passing out literature and therein lies the gravamen of the violation. The Respondent argues mainly that Kretz's statement was not coercive within the meaning of Section 8(a)(1) and that, at most, Kretz engaged in a singular mistaken effort to stop the distribution. The Respondent further argues that Kretz, once advised by Trice, went to Franks in good faith to get clarification and was instructed that he was wrong. The Respondent submits that since Kretz did nothing further to interfere with the distribution of literature by the employees who continued to hand out materials; that on balance, reasonably speaking, there was nothing unlawfully coercive about Kretz's comments.

The Respondent principally relies upon *Nice Pak Products*, 248 NLRB 1278, 1282–1283 (1980), for the proposition that "a

single effort to stop [the employee] from distributing leaflets on company property [does] not violate the Act." The facts of *Nice Pak* are remarkably similar to those of the instant case and would be highly persuasive were it not for one salient fact present there but not in the instant case—an apology by the offending supervisor to the affected leafleteer who, in turn, told her fellow employees of the supervisor's apology as well as his retraction of his prohibition against distribution. Clearly, the Board, which affirmed the administrative law judge's finding of no violation, felt that any residue of coercion was removed by the remedial efforts of the respondent. Here, while Kretz sought advice regarding the employees' distribution of literature on company property and was properly disabused of his erroneous view of the law, neither he personally, nor anyone else from management, did anything to rectify the issue with the employees involved. Therefore, it is reasonable to conclude that in spite of Trice's boldness (and the others in his group) in continuing to distribute materials, other employees, neither as bold nor informed, may have been chilled by Kretz's remarks in terms of pursuing their right to distribute union materials on company property during their off time. Accordingly, given the totality of the circumstances, I would conclude that the Respondent's statement to the employees was unlawfully coercive and, hence, violative of Section 8(a)(1).

D. The September 1996 Facilities Closure Statement

The General Counsel called one witness to establish this charge, alleged discriminatee Jerry Pore. Pore testified that he is currently employed by the Respondent as a warehouseman, a position he has held for around 13–14 years; he has been employed by the Respondent for a total of 23 years. According to Pore, during his tenure, the Respondent's employees have never been represented by a union. However, around June 1996, the employees began an organizing effort and he and a small group of workers contacted the Union for that purpose. Pore considered himself one of the original organizers of the organizing effort. Pore said that after becoming involved in the campaign, he had a conversation about the Union with his immediate supervisor, Donald "Dutch" Holtgreven,²³ sometime in September 1996 in the plant's distribution center cafeteria between 6 and 6:30 a.m. According to Pore, Holtgreven and he were alone in the cafeteria and, during the course of a 5–10 minute conversation, Holtgreven commented about what would happen if the Union came in. According to Pore, Holtgreven said that they (the Company) could shut the plant down, that the Company could do "a lot of things." (Tr. 90-91.) According to Pore, he agreed with Holtgreven.

Holtgreven²⁴ testified that he and Pore were personal friends. He admitted that in 1996 the two had some conversations about the Union's coming in, that the Union was quite the topic of conversation at the time. However, Holtgreven specifically denied telling Pore at any time that Whirlpool would or could close the plant if the employees were to vote the Union. According to Holtgreven, he did not banter with Pore about the Union either "pro or con" to avoid "conflicts." (Tr. 167.)

²² Kretz, an admitted supervisor, did not testify at the hearing. Franks, employed by the Respondent since 1978 and involved in human resources functions since 1983, serves as director of human relations with responsibilities covering employee relations for both hourly and salaried employees; in 1996, she served as manager of employee services.

²³ Pore said that currently he was a third shift worker—10:30 p.m. to 6:30 a.m.—and that Holtgreven was his supervisor for around 12 years.

²⁴ Holtgreven, an admitted supervisor, said that he works in the distribution center of the Respondent's facility. According to Holtgreven, he was a first shift supervisor in 1996, but occasionally ran into Pore in the company cafeteria between changes in shifts.

The General Counsel contends that Holtgreven's statement to current employee and known union supporter and organizer Pore—that if the Union were elected the Company *could* shut down the plant—was unlawfully coercive. However, the Respondent points out that the complaint alleges that Holtgreven, an admitted supervisor, coercively informed an employee that the Respondent *would* close the facility if the employees selected the Union. The Respondent submits that the testimony from the only witness produced to establish the charge, Pore, was that Holtgreven said if the Union came in, it *could* shut the plant down. The Respondent argues, thus, that the statement itself is vague in its meaning and one could only speculate as to what the statement expressing merely a possibility of closure, if believed, meant. Accordingly, such a statement, according to the Respondent, cannot be coercive. The Respondent also contends that Pore, as an active union supporter, was not credible. It argues that Holtgreven, by contrast, was believable and that his denial of making the statement should be credited.

Here, again, we face a credibility issue based on a one-on-one confrontation. The General Counsel once again asserts that Pore, as a current employee, should be given a presumption of credibility as to the making of the offending statement. Holtgreven, who denies making the specific offending statement, nonetheless, candidly admitted having discussions about the Union with Pore, whom he described as a friend. Therefore, before reaching the issue of whether the statement violates the Act, the threshold question is whether the statement was made and in what form. I would agree with the Respondent that in some respects, mainly concerning his testimony about an affidavit given to the Board's investigator and a document²⁵ he acknowledged signing but not authorizing or ratifying, Pore seemed confused, hesitant, and perhaps even evasive, and his credibility suffered in my view. However, Holtgreven, in terms of his overall testimony and demeanor, presented well. Moreover, I was impressed with his candor about discussing the Union at all with Pore, who he knew was an avid union supporter. As Holtgreven acknowledged, the Union's organizing efforts were quite the topic, and it seems perfectly logical and consistent with the noteworthiness of the event that two people who have worked together for over a decade and were friends would discuss the matter. While acknowledging conversation about the Union, Holtgreven denied making the statement attributed to him because, in a phrase, he knew better. I would credit his denial. Therefore, I would conclude that the Respondent did not violate the Act and would recommend dismissal of this aspect of the complaint.²⁶

²⁵ See R. Exh. 3(a), a memo bearing Pore's signature dated October 11, 1996, dealing with a purported counseling session which is the subject of an 8(a)(3) charge herein and which will be discussed infra.

²⁶ I would note that even if I had not credited Holtgreven's denial and credited Pore's version of the statement, I still would be persuaded to find no violation. First, if Holtgreven said that the Respondent *could* close the plant if the Union came in is simply not the same as saying that it *would* close the plant. A statement of possibility is not a threat in my view. Moreover, the charge in the complaint alleged that the Respondent said it would close the plant if the Union were selected. Thus, in my view, there would be a material and fatal failure of proof in the General Counsel's case, were I to credit Pore's version of the event.

Also, even if I were to overlook what I view as a material variance in proof and accept that the word "could" in context connoted "would" regarding closure of the plant, the conversation between the two friends bantering about the Union and its impact on their long-time employment with the Company seems more polemical than threatening, espe-

V. THE 8(a)(3) ALLEGATIONS

A. The October 3, 1996 Discipline of David Hamilton²⁷

David Hamilton testified that he became aware of the Union's organizing efforts in September 1996, and he became personally and actually involved in the campaign by attending meetings and rallies and passing out union (authorization) cards. Hamilton testified that on October 3 he was working the third shift (10 p.m. to 6:30 a.m.) and had been on the job about an hour or so when he was called to the office of his immediate supervisor, Lee Beck. Once there, according to Hamilton, he met with Beck and another supervisor, Kretz. According to Hamilton, Kretz did most of the talking and told Hamilton that he (Hamilton) had been accused of harassing someone; however, Kretz would not tell him the name of the person(s), saying that he was not at liberty to disclose the name(s) of the complainants. According to Hamilton, Kretz read off of a paper some charges and asked him to sign papers, but he refused because Kretz would not identify the complainants. After the meeting, which lasted around 20 minutes, Hamilton said he was told by Kretz to contact an individual in the Respondent's human relations department, Steven Traucht, presumably to deal with any questions he might have about the counseling. Hamilton said despite repeated efforts to contact Traucht, he was never able to speak with him.²⁸

As noted earlier, Kretz did not testify at the hearing; however, the Respondent did call Beck to answer the charges regarding Hamilton.

Beck, an admitted supervisor, testified that he, as Hamilton's immediate supervisor, and Steve Dearth, the third shift supervisor (an admitted supervisor in the Respondent's main and door lines), decided to counsel Hamilton regarding a complaint management had received from two female coworkers of Hamilton.²⁹ Consequently, Hamilton was summoned from the assembly line to the office he shared with Dearth for counseling. Beck stated that in addition to himself, both Kretz and Dearth were present; however, Beck could not recall whether he did most of the talking or whether Kretz stayed for the entire meeting as did Dearth.

According to Beck, Hamilton was advised by himself or one of the supervisors that two named female employees had com-

cially since the alleged statement was not communicated to other employees. I note that in the discussion, Pore agreed with Holtgreven, suggesting that the discussion was friendly more in the way of debate. I do not believe statements and conversations of this type are offensive to the Act, nor to the Board's decisions attempting to effectuate broad policies clearly designed to ensure a proper balance between the rights of employers and employees.

²⁷ Hamilton is currently employed by the Respondent and has been employed for around 15 years as a laborer in the main and door line of the Respondent's facility at Findlay.

²⁸ Hamilton said that after the meeting and after work that day, he tried to reach Traucht but was unable to make contact on that day; he tried several times and left his telephone number. Traucht did not return his calls. However, according to Hamilton, Traucht approached him on the job around a week before the instant hearing, gave him a piece of paper with the company's lawyer's name and the General Counsel's name on it, and told him if he felt he was wrongly accused in the supposed disciplinary action in October 1996, he (Hamilton) could talk to the General Counsel or the Respondent's attorney. Hamilton said he called no one.

²⁹ The coworkers were identified by Beck as Bonnie Ellerbrock and Sandy Mansfield, neither of whom testified at the hearing.

plained about his harassing conduct which they described as verbal harassment, "intimidation," and talking about the Union during worktime. Beck stated that he told Hamilton he should not be harassing the ladies and talking about the Union during worktime. According to Beck, he solicited Hamilton's response about the charge and Hamilton denied harassing the workers. According to Beck, he told Hamilton that the meeting would be documented on his (Hamilton's) "yellow card."³⁰

According to Beck, by company procedure, such a matter is ordinarily investigated³¹ by the supervisors and once documented, an entry is placed on the yellow card and the employee is asked to sign the card. In Hamilton's case, Beck said that Hamilton was again brought back to the office either later the same day of the meeting or the next day and asked to sign the yellow card in the presence of Dearth, Kretz, and himself. Beck said that Hamilton was shown the entry on his yellow card³² but he assumes that since Hamilton's signature does not appear on the entry, Hamilton did not sign it.³³

Regarding Hamilton's union activity, Beck was aware that Hamilton was expressing his views about the Union in working areas and on working time prior to the counseling meeting, but he had received no complaints from any sources about these activities. According to Beck, he counseled Hamilton solely because of the employees' complaints and that the counseling had nothing to do with Hamilton's support for the Union.

B. The October 10, 1996 Discipline of Jerry Pore³⁴

According to Pore, the employees at Whirlpool Findlay have never been represented by a union and around June 1996, a small group of employees, including him, contacted the Union and the organizing effort commenced. Pore stated that he was one of the original organizers and, toward the end, he canvassed employees soliciting their positions on the Union, distributed literature, and invited both employees and management to attend union meetings.³⁵

On October 10, Pore stated that he was called to the front office by Monte Sampson. Sampson told him the meeting was a counseling session concerning inappropriate activity which

Sampson described as his handing out (union) literature on company time. According to Pore, Sampson read "something" out of the employee handbook dealing with passing out literature on company time. Sampson emphasized that he was merely counseling him, but advised that the rule against passing out literature on company time was generally known. According to Pore, he was unaware of the rule at that time. However, Pore said that he was not told when he was supposed to have violated the rule. Moreover, according to Pore, he was not asked to sign anything nor was he shown a copy of his yellow card at the meeting. Pore said he did respond to Sampson's accusation by telling him that he passed out materials only on his own time before he started his regular Shift. Pore viewed the counseling session as a disciplinary action.³⁶

The Respondent called two admitted supervisors to rebut the allegations of its treatment of Pore—Michelle Obenour and Monte Sampson.

Obenour admitted that on October 10, she was involved in counseling Pore for passing out union literature on worktime based on complaints she had received from several of Pore's coworkers who, individually, had approached her on the same day with their complaints.³⁷ According to Obenour, after receiving the complaints, she called the Respondent's human resources office, spoke to Connie Walls, the director, and explained the situation and sought advice as to how to proceed. She specifically requested that someone be sent to assist in the counseling. Walls sent second shift supervisor Monte Sampson with whom she met prior to speaking with Pore. Once apprised of the complaints, Sampson approved the counseling. According to Obenour, she did no prior investigation prior to counseling and specifically did not talk to Pore before meeting with him in her office. Also, before calling him in, Obenour said that she made an entry on Pore's yellow card about the subject matter of the anticipated counseling. Eventually, Pore was called in off the line and, as she recalls, only Sampson addressed Pore regarding the complaints and advised him about the company rules regarding solicitation on company time.

Obenour stated that Sampson actually read the company rule from the employee handbook to Pore and then asked him if he understood the rule, specifically its prohibition against solicitation on company time during work hours. In short, according to Obenour, Sampson told Pore that he violated the rule by handing out literature and soliciting workers during their worktime and while he was working; and she herself believed that Pore had engaged in that conduct.

³⁰ The "yellow card" as stipulated and agreed by the parties is an attendance/tardiness and conduct record, maintained by an employer/supervisor throughout the course of the employees' employment with the Respondent; it travels with the employee in his/her assignments and is given to his/her supervisor; but not necessarily is it kept or maintained in the employee's personnel file. (Tr. 19-20.)

³¹ Notably, Beck could not recall whether he personally talked to the employees who complained about Hamilton's conduct for purposes of any investigation of the matter.

³² GC Exh. 5 is a page taken from Hamilton's yellow card and reflects the October 3 meeting. Beck acknowledged his signature and that of Kretz who prepared the handwritten remarks.

³³ According to Beck, the yellow card does not note any refusals to sign by the affected employee because the Respondent does not consider the yellow card a formal document, that is, the entry is not a disciplinary action in any way and it cannot be used to deny a promotion nor be appealed from; it is intended only to track behavior but nothing else can be done with it.

³⁴ Pore is currently employed at the Respondent's Findlay facility and has been in its continuous employ for around 23 years; for the last 13-14 years, he has worked as a warehouseman.

³⁵ Pore stated that he invited management to union meetings including Dennis Krueger, a former vice president; Monte Sampson, superintendent of the second shift; Holtgreven, his current supervisor; Don Debouver, second shift warehouse supervisor; Jim Beachler, manager of the distribution center.

³⁶ Pore conceded that he may have been in a working area on the floor but he denied generally handing out literature during working hours. He, however, admitted that he might have passed out literature on company time when an employee requested information. (Tr. 91.)

³⁷ Obenour identified the complaining employees as William Bowling and Murl Phelps, second shift workers, and David Pierce, a first shift worker. According to Obenour, Bowling complained that Pore continuously, on a daily basis, approached him about signing a union authorization card and otherwise trying to talk about the Union. Phelps and Pierce made similar complaints, with Pierce expressing that he was tired of and frustrated by Pore's overtures; Phelps asked her to keep his name out of the complaint, as he and Pore were friends.

Obenour herself, prior to receipt of these complaints, had observed Pore passing out literature but she did not make an issue of it. However, she said that the employee complaints triggered her subsequent actions because the employees claimed they were bothered by him and requested that he be stopped.

Monte Sampson, the second shift supervisor, testified that he was involved in counseling Pore on October 10 in Obenour's office around 10–11 a.m. because Obenour requested assistance in dealing with a problem that had arisen. According to Sampson, Obenour informed him that there were employee complaints about Pore's promoting his beliefs on company time and in the work areas, and there was some disagreement between Obenour and Pore over whether he was being disciplined with regard to the rules. Sampson said that he was asked to assist in the matter and went to Obenour's office to meet with Pore and Obenour and to further counsel him on the solicitation rules, as he understood that Obenour had begun some counseling before he arrived.

Sampson said that he told Pore that he was there to assist in counseling because of employee complaints, and he wanted to be sure Pore was aware of the Company's policy on solicitation and distribution. Sampson said that he also informed Pore that the counseling session was not disciplinary in nature—merely counseling. Sampson believed that he did not ask Pore for his version of events at this meeting and did not independently investigate the matter; nor did he inquire of Obenour whether she had investigated. Sampson could not recall whether he informed Pore of the nature or specifics of the employees' complaints, but he knew at the time that Pore had been accused by the employees of putting up literature and approaching workers on company time in work areas; and trying to change the employees' opinion about the Union.

Sampson admitted that the counseling session was written up on Pore's yellow card by Obenour and signed by him as a witness on the evening of the meeting. According to Sampson, Pore was shown the violation but he could not be sure whether Pore was asked to sign it. Sampson said that the counseling session was not a formal discipline. However, all such conversations with an employee had to be documented on the yellow card in case anything escalated from the incident. According to Sampson, the yellow card entry has no effect on Pore's terms or conditions of his employment, such as promotion.³⁸ According to Sampson, Pore did not deny that he engaged in the conduct complained of by the employees.

C. The Contentions of the Parties regarding the 8(a)(3) Allegations

The General Counsel essentially contends that both Hamilton and Pore were unlawfully disciplined for their union support and activities. In the case of Hamilton, she argues that he was called in for counseling to harass him for his known support of the union campaign and to discourage him from engaging in further activities supportive of the Union. As to Pore, she contends that he was singled out for violating the Respondent's solicitation work rules because of his known support for the Union. She notes that the discriminatory nature of Pore's discipline is demonstrated by the Respondent's allowing other employees, supervisors, and line employees alike, during the period in question, to buy and sell nonbusiness items in violation of the rule but without penalty.

The Respondent contends, first, that contrary to the complaint allegations, neither Hamilton nor Pore was disciplined in that the counseling they received had no bearing or impact on

their respective wages, terms, and conditions of employment. Moreover, in fact, neither man considered the counseling discipline in spite of entries placed on their yellow cards. Second, the Respondent asserts, assuming *arguendo* that the counseled workers were disciplined, that the General Counsel did not establish that the counseling was motivated by a discriminatory motive, there being no showing of antiunion animus by the General Counsel. The Respondent also submits that even if for the sake of argument the General Counsel met her burden of showing an unlawful discipline, the Company clearly established that Pore and Hamilton would have been counseled pursuant to its genuine and good-faith belief that its harassment and no-solicitation policies had been violated. Accordingly, for these reasons, the Respondent contends the charges should be dismissed.

D. Discussion and Analysis

1. The disciplinary issue

A threshold issue is whether the counseling of the two employees and the documentation of the counseling sessions on the yellow cards constitute such disciplinary action in regard to any term or condition of employment within the meaning of Section 8(a)(3) of the Act.

The Respondent asserts that the counseling received by Pore and Hamilton does not constitute discipline on several grounds. First, the supervisors who counseled each man did not even have the authority to discipline as that authority is vested in the company's human resources department; and that all true disciplines are always noted on a specific form (a disciplinary notice).³⁹ Second, the conduct noted on the yellow card is not used for disciplinary action, only to advise the employee of policy, and may not be appealed through the ordinary disciplinary process. Third, the counseling and yellow card entry does not affect the employee's promotions or other terms and conditions of employment. Thus, the Respondent contends that the counseling associated with the yellow card is merely the Respondent's "non formal" noting of a discussion with the affected employee and his or her being made aware of specific company policy.⁴⁰

The General Counsel disagrees and submits that the counseling sessions endured by Pore and Hamilton are in every aspect a form of discipline in the context of this case and, in fact, conforms to the Respondent's first level of the Respondent's established and stipulated and agreed disciplinary process.⁴¹ On the

³⁹ See R. Exh. 1, a copy of the disciplinary notice.

⁴⁰ Support for the Respondent's position regarding the nondisciplinary effect of the counseling and yellow card entry procedure was provided by the testimony of Franks.

⁴¹ The parties stipulated and agreed that following policy guidelines contained in the employee handbook were in effect at the Respondent's plant during all material times.

Discipline

The Findlay Division realizes that corrective action or the discharge of an employee is a very serious matter. In the event of a violation of plant rules, or of other conduct requiring disciplinary action, any of the following penalties may be imposed according to the frequency and seriousness of the offense:

- Counseling by the employee's supervisor
- A written verbal reprimand
- A written reprimand
- A final written warning
- Suspension

³⁸ Pore's yellow card entry for October 10 is contained in GC Exh. 4. According to Sampson, there is no time limit for appeals of yellow card counseling as are required for formal disciplines and this was explained to Pore.

latter point, the General Counsel submits that the Respondent's attempt to distinguish Pore and Hamilton's yellow card counseling from the stated counseling in the companies' published policy manual should be rejected because there is no provision for different types or levels of counseling. She notes that the handbook only refers to counseling by supervisors, clearly what both men received on the dates in question.

The General Counsel argues that any employee who was aware of the handbook provision could reasonably believe that he/she was being disciplined irrespective of whether the discipline was memorialized on the yellow card or on the formal disciplinary notice.⁴²

I would agree with the General Counsel and find and conclude that by summoning both Pore and Hamilton from their work assignments and directing them to appear in a supervisor's office where each was informed of his violation of a stated and expressed company rule or policy in the presence of two or more representatives of management, and the session was memorialized by an entry on a permanent record which traveled with the employee throughout his employment and was subject to review by other representatives of management, the Respondent disciplined the affected workers.

The Respondent's argument of the nondisciplinary nature of the counseling here is principally buttressed by *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993), where the Board determined that the employees' issuance of a conference report constituted nothing more than counseling and no discipline was imposed on the employee. The Board in reversing the administrative law judge noted that the receipt of the conference report does not result in any adverse action against the employee and did not therefore affect any term or condition of employment within the meaning of Section 8(a)(3). *Id.* at 403-404.

In my view, the facts here are clearly distinguishable from those of *Lancaster Fairfield Community Hospital*. Here, the counseling session memorialized by the yellow card clearly corresponds to the first step of the Respondent's formal disciplinary process and procedures. Notably, this process does not allow for distinctions between or gradations of formal and informal counseling, as argued by the Respondent. Second, and probably most important for my determination, the yellow card entry, unlike the conference report in *Lancaster Fairfield Community*, can serve as a predicate for future adverse action against the employee. While Franks, the Respondent's human resources director, testified that there was no negative impact on the employee from an ostensibly negative remark on the yellow card, she also acknowledged (using Hamilton's alleged

harassment as an example) that the yellow card would be reviewed by human resources where subsequent allegations of violations were made to see if there were any prior discussions with the employee relative to the policy. Clearly, then if there is a repeated violation of the policy, the yellow card is considered by the Respondent's human resources department in determining what disciplinary action may be appropriate. It is interesting on this point that Beck, who signed off on Hamilton's counseling session, admitted that another supervisor could review the yellow card entries about the employee for problems the employee may have had; that the yellow card is used to track on-the-job behavior of the employee. Beck also admitted that with respect to the October 3, 1996 yellow card entry for Hamilton that if his behavior was repeated, this entry would be considered by the Company and the prior incident would affect what action the supervisor might take for the subsequent incident. Notably, Sampson, who signed off on Pore's counseling session, acknowledged that the notation (of counseling) is kept on the yellow card in case there was an escalation of that conduct⁴³ by the employee.

There is no dispute that the yellow card records both positive and negative employee conduct. However, a yellow card entry reflecting an employee's violation of important company policies, and his counseling therefor, in my view, can have an adverse consequence or effect on the employee's terms and conditions of employment and "may be a foundation for future disciplinary action." *Trover Clinic*, 280 NLRB 6, 16 (1986).⁴⁴ Accordingly, I would find and conclude that the Respondent disciplined both Hamilton and Pore on the dates as alleged in the complaint.

2. The Wright Line analysis

Having determined that both Pore and Hamilton were disciplined within the meaning of Section 8(a)(3), the issue remains whether the Respondent violated this provision of the Act as charged in the complaint, that is because of or, as argued by the General Counsel, in retaliation for their union activities.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization. 29 U.S.C. §158(a)(3).

⁴³ See Tr. 61. Later in his testimony, Sampson stated that escalation was a poor choice of words and said "re-occurrence" is a more appropriate term. However, in my view, Sampson's use of the term escalation was more descriptive of and consonant with the Respondent's established progressive disciplinary process as set out in the employee handbook. In short, counseling by a supervisor by any other name is counseling by a supervisor, the first step in the Respondent's disciplinary scheme.

⁴⁴ The instant case presents an even stronger case than *Trover*. There, the Board determined that an oral reprimand served as the foundation for future disciplinary action. See, also, *Dico Tire, Inc.*, 330 NLRB 1252 (2000), wherein a verbal warning was determined to constitute discipline when the company failed to prove they would rescind the warnings at a later date. In *Dico*, the employee had received a verbal warning from a supervisor for distributing union literature in the company break room. Likewise, in *Funk Mfg. Co.*, 301 NLRB 111 (1991), a manager had given an employee observed distributing union literature while off duty in a nonwork area entranceway a "casual reminder" and told the employee a second offense would result in an "oral reprimand and something for the file." The Board determined that the verbal warning fell within the Company's formal disciplinary program.

• Discharge

In the event of a serious plant rule violation of if discharge is indicated, the employee may first be placed on suspension to allow for a complete and thorough investigation of the facts of the case.

⁴² It should be noted that the Respondent argues that Pore "admitted" that the counseling session and the yellow card entry were not discipline and Hamilton did not know whether his counseling session was discipline, in effect an admission. (R. Br., p. 14.) Whether the employees were disciplined is a matter of legal interpretation and, therefore, the alleged discriminatees' view of the nature of the employer's conduct, in my view, is irrelevant. However, by contrast, I would agree that it is the more likely case that employees probably would make little or no distinction between the handbook's counseling by supervisors and the counseling of the type received by Pore and Hamilton, irrespective of whether the counseling was memorialized by a yellow card entry on the formal disciplinary notice.

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) or (1) of the Act, the Board has held that the General Counsel must first make a showing sufficient to support the inference that the protected activity(ies) of the employee was a motivating factor in the employer's decision to discipline or discharge him/her. If this is established, the burden then shifts to the employer to demonstrate that discipline or discharge would have occurred irrespective of whether the employee was engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981). It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances proved. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity, animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 349 (1991).

Evidence of suspicious timing, false reasons given in defense, failure to investigate adequately alleged misconduct, departures from past practices, tolerance of behavior for which the employee was disciplined, disparate treatment of the affected employee, and discriminatory enforcement of facially valid work rules or policies may support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enf'g. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Service Co.*, 309 NLRB 23 (1992).

Once the General Counsel has made a prima facie case, the burden shifts back to the employer. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

With these principles in mind, we turn to the disciplines of the two alleged discriminatees.

3. The discipline of David Hamilton

The Respondent readily concedes that it summoned Hamilton, who was known to management as a union supporter and activist, for counseling about his union activities, but only because two of Hamilton's coworkers complained to management that he verbally harassed and intimidated them in talking about the union during worktime; the employees wanted Hamilton to cease his harassing behavior and demanded responsive action from the Respondent.

The Respondent asserts that it would have counseled Hamilton regardless of his engaging in protected activity because of its genuine concern for and because of the coworkers' complaints which it interpreted to be violative of company policy

regarding harassment,⁴⁵ as well as plant rules which prohibited threatening, intimidating, coercing, or interfering with any employee on company premises.⁴⁶

The question here is whether the Respondent has met its burden under *Wright Line's* preponderance standard regarding this defense.⁴⁷ The Respondent correctly points out that employers have the right to ensure that the work place is free of untoward, annoying, intimidating, and illegal behavior on the part of employees. Employers clearly have the right to maintain order, discipline, and productivity at the workplace and, furthermore, as the Board recognizes, the employers need only show that its belief in improper conduct on the part of an employee was reasonable and genuine. *Lancaster Fairfield Community Hospital*, supra, at 405. Thus, the issue here is whether the Respondent has sufficiently established that it held a reasonable, genuine belief that Hamilton was harassing and intimidating his coworkers in the course of his union organizing activities (ordinarily protected activity under the Act) to justify counseling him and making an entry on his yellow card, in short to discipline him for his conduct. First, it should be noted that Hamilton did not accept the accusations of alleged harassment and demanded that his accusers be identified. However, Hamilton was never told who his accusers were, but that he had "harassed" them and "intimidated" them.⁴⁸ According to one of the Respondent's supervisors, Hamilton denied the charges and the supervisor could not recall whether he (or anyone else in management) personally talked to the complaining employees after the first counseling session; but still as part of the Company's "investigation" of the matter, Hamilton was written up under the anti-harassment policy for "forcing your opinions on people." Hamilton was warned that further disciplinary action would be taken for repeat violations. I do not find under the circumstances and facts presented by the Respondent that it has established sufficiently the reasonableness of its belief that Hamilton "harassed and intimidated" his coworkers. I am most compelled to this conclusion by the insufficiency of the evidence from the complaining coworkers mainly as to the specifics of Hamilton's conduct. On this record, it is not clear as to what in Hamilton's behavior was offensive to them, how his behavior in addressing union matters may have interfered with their ability to perform their jobs or disturbed the work place or was threatening or intimidating. The Respondent contends that it acted on complaints of Hamilton's alleged "harassment and

⁴⁵ The Respondent's antiharassment policy is contained in GC Exh. 6, an excerpt from the employee handbook which the parties stipulated and agreed was in force and effect during the material period. It should be noted that this provision of the handbook deals with equal opportunity matters, that is harassment based on age, color, race, religion, national origin, and sex of the employees.

⁴⁶ The Respondent's plant rules regarding threatening and intimidating behavior is contained in R. Exh. 9, another excerpt from the employee handbook. I will presume that this part of the same handbook was in force and effect during the material period.

⁴⁷ The Respondent also submits by way of defense that the General Counsel failed to establish any employer animus against the Union. However, as noted, animus may be derived from the entire record and where it is established that the union activity was the motivating factor in the discipline in question. The Respondent concedes that Hamilton and Pore's union activities were the basis for the counseling.

⁴⁸ In this regard, I have credited Hamilton's testimony because he seemed sincere and straightforward in relating his version of events and his part in the counseling matter. Also, his testimony is corroborated in part by Beck and Beck's yellow card entry. (See GC Exh. 5.)

intimidation” of the coworkers but without a context, these words are rendered meaningless. For instance, the Respondent invoked harassment language from the equal opportunity provisions of the employee handbook to counsel Hamilton and to write him up. Yet, the coworkers’ complaints did not seem to relate to their sex or other factors contained in the handbook. The Respondent also relies upon general plant rules that relate to a whole panoply of possible employee misconduct, including that of an intimidating and threatening type. In my view, the complaints of the coworkers did fall into this category. And if Hamilton had engaged in truly intimidating and threatening conduct of the genre incorporated in the formal plant rules, he would have been, in my view, formally disciplined by the Respondent, as were other employees.⁴⁹ The problem is that it was not clearly shown about what these coworkers were complaining. In my view, this is a material insufficiency of proof that fatally undercuts the Respondent’s position regarding the reasonableness and genuineness of its belief about Hamilton’s behavior. Significantly, there was no explanation given by the Respondent for the nonappearance of the two workers whose complaints led to Hamilton’s discipline at the hearing.⁵⁰ Therefore, without a clear understanding of the exact nature of Hamilton’s conduct which moved the coworkers to complain, I am left to speculate about what formed the basis of the Respondent’s belief, irrespective of whether it was reasonable or genuine, that Hamilton violated its policies. It is not sufficient in my view to use harassment and intimidation as mere shibboleths to justify interference with rights guaranteed employees under the Act. Therefore, under *Wright Line*, I would find and conclude that the General Counsel has met her burden and that the Respondent’s defense fails on sufficiency grounds. Accordingly, I would find that the Respondent violated Section 8(a)(3) by impermissibly disciplining Hamilton because of his union activities and to discourage his and other employees’ involvement with the Union.

4. The discipline of Jerry Pore

The Respondent submits that known union activist Pore was counseled essentially because three employees complained about Pore’s soliciting activities and demanded of management that his activities cease. Thus, the Respondent argues that “it was Pore’s solicitation manner, and not the mere fact that he was violating Whirlpool’s policy that necessitated him to be counseled” (R. Br., p. 21) and his yellow card annotated.⁵¹

⁴⁹ See. R. Exh. 10, which contains formal disciplinary notices for a number of employees who were disciplined by the Respondent for violation of the general plant rules, including threatening and intimidating employees.

⁵⁰ My research of applicable cases, and consideration of those cited by the Respondent, reveals that as a general proposition where the Board has sanctioned reasonableness of the employer’s belief in violations of company policy, the employer has produced evidence regarding the basis of its belief, usually in the form of testimony from other employees who witnessed the violation in question. See, e.g., *American Thread Co.*, 270 NLRB 526 (1984), and *Hicks Ponder Co.*, 168 NLRB 806 (1967).

⁵¹ The Respondent evidently concedes that in spite of its no-solicitation rule, Pore’s supervisors had previously allowed him to violate it for example, Obenour admitted that she saw Pore engaging in a prohibited solicitation prior to the counseling session but did not counsel him or ask him to stop the activity. Also, the Respondent seemingly does not dispute Pore’s testimony that he and other employees, including supervisors, were buying from and selling to one another

First, here again, none of the three complaining coworkers testified and, at best, based on Obenour’s testimony, it would appear that these workers were merely annoyed by Pore’s daily requests to sign authorization cards, presumably, on company time during work hours. However, under oath, Pore denied handing out literature and seeking signatures for the cards on worktime, except where someone specifically requested materials. This denial, if credited, significantly undercuts the Respondent’s position. Thus, the resolution of this matter redounds to Pore’s credibility because clearly, his sworn on-the-record testimony, if believed, would trump the basically hearsay and frankly underdeveloped “testimony” of the three purported complaining coworkers. As noted earlier herein, I did not fully credit Pore’s testimony regarding the Holtgrevan incident. However, Pore was not a totally incredible witness. Clearly, his memory was not the sharpest, but I attribute this to the passage of time (nearly 3 years have elapsed), and other witnesses similarly and understandably experienced difficulties in recall. So I will not hold this against him. On balance then, in my view, Pore was a credible and candid witness in this counseling matter and his denial of the accusations regarding his “manner” of solicitation is credited. As to the “complaints” of the three employees relied upon by the Respondent to enforce its no-solicitation policy, the Respondent evidently elected not to call either or any of them, nor did it explain their non-appearance. While I do not draw any negative inference from their non-appearance, the record nonetheless is devoid of sufficient evidence to rebut Pore’s credited denial of any behavior violative of the policies under which the Respondent claims to have justifiably counseled him. Thus, because the record is thus deficient, I cannot conclude that the Respondent’s counseling of Pore was based on a reasonable and genuine belief that Pore violated its policies and in spite of his engaging in protected activities, the Respondent would have counseled him nonetheless.⁵² I would find and conclude that the General Counsel has met her *Wright Line* obligations and that the Respondent, on grounds of insufficiency, has failed to establish its defense that it would have taken the action against Pore in spite of his engaging in protected activity.

CONCLUSIONS OF LAW

1. Whirlpool Corporation, the Respondent herein, is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By its supervisors’ informing employees that they were not allowed to distribute union literature on company property, the Respondent violated Section 8(a)(1) of the Act.

4. By disciplining employees David Hamilton and Jerry Pore because they assisted the Union and engaged in concerted activities and to discourage employees from engaging in these

on the work floor and during work hours various nonbusiness items, i.e., candy bars for school and church-related fund raisers. It seems that these types of activities took place on an ongoing basis with no interference from management. I note that there evidently were no complaints about these other employee solicitations communicated to management.

⁵² I would also note that the discriminatory nature of Pore’s discipline is buttressed by the Respondent’s evident widespread allowance and/or condonation of violations of the no-solicitation rule by employees who engage in nonprotected activities.

activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act in any other way, manner, or respect.

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily disciplined David Hamilton and Jerry Pore, I shall recommend that it be ordered to make them whole for any loss of earnings and other benefits they may have suffered by virtue of the discrimination practiced against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵³

ORDER

The Respondent, Whirlpool Corporation, Findlay, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they are not allowed to distribute union literature on company property.

(b) Disciplining or otherwise discriminating against any employees for assisting the Union and engaging in concerted activities; and discouraging employees from engaging in their activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Make David Hamilton and Jerry Pore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files, including so-called yellow cards, any reference to David Hamilton and Jerry Pore's unlawful discipline (counseling), and within 3 days thereafter, notify them in writing that this has been done and that the disciplines will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze any backpay which may be due under the terms of or other compliance with this Order.

(d) Within 14 days after service by the Region, post at its facility in Findlay, Ohio, copies of the attached notice marked

"Appendix."⁵⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 3, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 9, 2000

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discipline employees engaged in lawful protected activity.

WE WILL NOT discipline (counsel) or otherwise discriminate against employees because of their known or suspected membership in and/or support for United Steelworkers of America, AFL-CIO, or any other labor organization.

WE WILL NOT tell employees that they are not allowed to distribute union literature on company property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL make David Hamilton and Jerry Pore whole for any loss of earnings and other benefits resulting from their disciplines because of known or suspected membership in and/or support for United Steelworkers of America, AFL-CIO, less any net interim earnings, plus interest.

⁵³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of this Order, remove from our files, including so-called yellow cards, any reference to David Hamilton and Jerry Pore's unlawful disciplines, and within 3 days thereafter, notify them in writing that this has

been done and that the disciplines (counseling) will not be used against them in any way.

WHIRLPOOL CORPORATION